Supreme Court, U.S.
FILED
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NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

SUSAN DAWSON KILCREASE,
Petitioner

vs.

GENERAL MOTORS CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT JUDGE PROPERLY RECONCILED THE APPARENT INCONSISTENCY IN THE JURY'S VERDICT SO THAT A NEW TRIAL IS NOT REQUIRED.

II

PARTIES TO THE PROCEEDING

The names of the parties to this proceeding are contained in the caption of this case.

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NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

SUSAN DAWSON KILCREASE,
Petitioner

vs.

GENERAL MOTORS CORPORATION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Susan Dawson Kilcrease, prays that a Writ of Certiorari issue to review the Judgment of the Fifth Circuit Court of Appeals in this case.

OPINION AND ORDER OF THE FIFTH CIRCUIT COURT OF APPEALS

The unpublished Opinion and Judgment of the Fifth Circuit Court of Appeals, and the Order denying Petition for Rehearing are printed in the Appendix.

STATEMENT OF JURISDICTION

The Trial Court's jurisdiction of this care arises from 28 U.S.C.A. Sec. 1322. The Court of Appeals' jurisdiction is based on 28 U.S.C.A. Sec. 1291.

Jurisdiction of this Court is based on 28 U.S.C.A. Sec. 1254, Subdivision (1) and Rule 10(c), U.S.S.C.R. The Judgment of the Fifth Circuit Court of Appeals is dated August 18, 1995. Petitioner's Petition for Rehearing was denied on September 8, 1995. This Petition is timely filed pursuant to 28 U.S.C.A. Sec. 2101(c) and Rule 13, U.S.S.C.R.

FEDERAL RULE OF PROCEDURE INVOLVED IN THIS CASE

Rule 49, F.R.C.P., provides as follows:

"Special Verdicts and Interrogatories

"(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written find-

ings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, it it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

"(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with

each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

STATEMENT OF THE CASE

This is a products liability case by Susan Dawson Kilcrease (Kilcrease), the owner and driver of a 1988 Chevrolet Cavalier, against General Motors Corporation (GMC) for injuries resulting from a November 4, 1989, collision and the effects and damages caused thereby.

At the conclusion of the trial of this case, the Court submitted its oral charge and written questions to the jury, pursuant to Rule 49(a), F.R.C.P.

The jury returned its verdict, finding, as shown in the Appendix, that GMC failed to provide adequate warnings or adequate instructions regarding seatbelts which was a producing cause of Kilcrease's injuries (Interrogatory No. 4). Conditioned on its "We Do" answer to No. 4, the jury found that the other driver, Lopez, was negligent which was a proximate cause of Kilcrease's injuries (No. 5); and that Kilcrease was not negligent (No. 6).

Then, even though No. 6 (Kilcrease's negligence/proximate cause) was answered "We Do Not," since No. 5 (Lopez' negligence/proximate cause) and No. 4 (GMC's failure to warn or instruct/producing cause) were answered "We Do," the jury answered Interrogatory No. 8 on contributing cause. Said Interrogatory did not inquire as to Kilcrease's "negligence" as a "proximate cause." The jury's findings attributed 25% cause to GMC defects, 70% cause to Lopez and 5% cause to Kilcrease.

Judgment was signed by the Trial Court awarding Kilcrease the damages found by the jury, plus her stipulated past medical expenses and pre-judgment interest.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Kilcrease respectfully submits that the Trial Court did not abuse his discretion in reconciling the jury's answers and in entering Judgment for her.

At the time of the return of the jury's verdict, the Trial Court considered the possible inconsistency between the "5%" contributing cause placed on Kilcrease by the jury's answer to No. 8, and the jury's answer to No. 6, clearing her of negligence. The Trial Court found no irreconcilable inconsistency and disregarded the answer to No. 8. Kilcrease submits that such action by the Trial Court was correct and should have been affirmed by the Court of Appeals.

It is respectfully submitted that in finding an "irreconcilable jury verdict," rather than reconciling the answers in question, the Court of Appeals has decided an important federal question in a way that directly conflicts with relevant decisions of this Court.

This Court, under circumstances like those in this case, has clearly required that any Court faced with a claim of inconsistency in a jury verdict must:

> "...attempt to reconcile the jury's findings, by exegesis if necessary, ...before we are free to disregard the jury's special verdict and remand the case for a new trial." *Gallick v. Baltimore & Ohio R. Co.*, 9 L.Ed.2d 618 (1963) at p. 627.

Further, this Court has held that reconciliation is the preferred course, and has directed that:

> "...*Where there is a view* of the case that makes the jury's answers to special interrogatories *consistent*, they *must* be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment. ..." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 7 L.Ed.2d 798 (1962) at p. 807. (Emphasis Added).

Before this case, the Fifth Circuit has applied those stated directives to create consistency, and to resolve apparent inconsistency. See, e.g.: *Griffin v. Matherne*, 471 F.2d 911 (5th Cir., 1973); *Alverez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037 (5th Cir., 1982).

Kilcrease submits that in this case there is only an apparent, reconcilable inconsistency in the jury's answers to Interrogatories No. 6 (Kilcrease's negligence/proximate cause) and No. 8 (contributing cause).

As shown by the printed portions of the verdict in the Appendix, the instruction to Interrogatory No. 8 required that it be answered, whether the answer to No. 6 was "We Do" or "We Do Not." Further, such instruction did *not* inquire as to *negligent* causation of either Lopez (the other, non-party driver) or Kilcrease.

Instead, the instruction preceding Interrogatory No. 8 directed an answer whether No. 6 was answered or not, *if*, as was the case, No. 5 was answered "We Do." Nos. 5-11 were preceded by an instruction requiring a "We Do" answer to at least one of the Interrogatories Nos. 1-4. Therefore, the jury was intstructed to answer No. 8 on the *combination* of its "We Do" answers to No. 4 (GMC's failure to warn/instruct) and No. 5 (Lopez' negligence/ proximate cause), *no matter how it answered No. 6.*

Prior to this case, the Fifth Circuit had held that consideration of the instruction's language is necessary in the reconciliation process.

> "...(the) constitutional mandate to *create consistency* requires that (the Court) look beyond the face of the interrogatories to the court's instructions as well. (Citing cases)." *Alverez*, cited above, 674 F.2d at p. 1040. (Insertions and Emphasis Added).

The instruction to No. 8, to which no objection was made by GMC, did not require a *negligent* "percentage of causation attributable to a person" to be found. Therefore, there is:

> "...a logical and probable decision on the relevant issues as submitted, even though the form of the issue or alternative selective answers ...may have been the likely cause of the difficulty and largely produced the apparent conflict. ..." *Griffin*, cited above, 471 F.2d at p. 915.

GMC and the panel of the Fifth Circuit Court of Appeals responsible for reversal of this case have erroneously relied on *Bonin v. Tour West, Inc.*, 896 F.2d 1260 (10th Cir., 1990). Unlike this case, *Bonin* involved clearly conflicting jury findings.

In *Bonin*, the jury answered "No" to questions 1 and 2, finding that the defendant, Tour West, Inc., was not "*negligent* in causing the accident" as to the two plaintiffs. Despite that finding, the jury then found the defendant "10%" and "5%" *negligent* in causing the accident as to each plaintiff in answer to questions 7 and 8. At p. 1262. Those answers are obviously and irreconcilably inconsistent.

In this case no instruction or question, requiring a finding of *negligent* causation or proximate causation on the part of Kilcrease, was part of Interrogatory No. 8. Nor was No. 8 conditioned on an affirmative answer to No. 6, which would have ascribed negligence/proximate cause to Kilcrease.

Therefore, unlike the *Bonin* case, there is no irreconcilable inconsistency or conflict between the "We Do Not" answer to No. 6, exonerating Kilcrease from negligence, and the "5%" answer to a portion of No. 8, attributing a percentage of "cause" to her.

It is only *negligence* which was a *proximate cause* that would reduce or deny Kilcrease's recovery in this case. No such finding was made by the jury.

The jury's finding of "5%" non-negligent "cause" is an inconsequential answer to a non-determinative question – a question submitted *without objection* by GMC. Therefore, the issue of Kilcrease's *negligence* as a *contributing cause* of her injuries was waived by GMC. See: Rule 49(a), F.R.C.P.

As correctly noted by GMC's trial counsel when the jury returned its verdict, any inconsistency in the findings in question "...probably would not change the end result." 8 R. 167.

The Trial Court made a concerted effort to reconcile this apparent inconsistency, accepted the jury's verdict and later entered the Judgment now reversed by the Court of Appeals. Kilcrease respectfully submits that there is no conflict in the answers that requires a new trial of this case.

It is submitted that the action of the Fifth Circuit Court of Appeals in this case conflicts with this Court's decision

in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 7 L.Ed 798 (1962) and *Gallick v. Baltimore & Ohio R. Co.*, 9 L.Ed.2d 618 (1963). Kilcrease further submits that this Court should harmonize the procedures called for in preserving claimed error in jury verdicts under Subdivisions (a) and (b) of Rule 49, F.R.C.P.

CONCLUSION AND PRAYER

Petitionery, Susan Dawson Kilcrease respectfully requests that this Petition for Writ of Certiorari be granted, that the Court of Appeals' Judgment of August 18, 1995, be reviewed and reversed, and for such other and further relief to which she may be justly entitled at law or in equity.

Respectfully submitted,

SEALE, STOVER,
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Jasper, Texas 75951
(409) 384-3463
Attorneys for Petitioner

By: _____
March H. Coffield
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the United States Supreme Court bar and counsel of record for the Petitioner herein and that, on the_____ day of November, 1995, three (3) copies of the above and foregoing Petition for Writ of Certiorari were served on each party represented herein, pursuant to United States Supreme Court Rule 29, by depositing same in the United States Post Office, Jasper, Texas, with postage prepaid, Certified Mail, Return Receipt Requested, and properly addressed to counsel of record for Respondent, to wit: Mr. P. Michael Jung, Strasburger & Price, 4300 NationsBank Plaza, 901 Main Street, Dallas, Texas 75202, and Mr. James J. Juneau, Strasburger & Price, 2800 One Houston Center, 1221 McKinney, Houston, Texas 77010.

March H. Coffield

APPENDIX

Sec. IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BEULAH DAWSON, WINFRED DAWSON
AND SUSAN DAWSON KILCREASE

V.

GENERAL MOTORS CORPORATION

No. 2:91CV152

VERDICT OF THE JURY

* * *

Interrogatory No. 4

Do you find, from a preponderance of the evidence, that General Motors Corporation failed to provide adequate warnings or adequate instructions regarding seatbelts found in Susan Dawson Kilcrease's Chevrolet Cavalier, and that such failure, if any, was a producing cause of Susan Dawson Kilcrease's injuries, if any?

We do
(ANSWER "We do" or "We do not")

Interrogatory No. 5

If you have answered "we do" to any of the preceding Interrogatories, then continue. If you have answered "we do not" to all of the preceding interrogatories, turn to the last page, have your foreperson date and sign the form and notify the security officer that you have reached a verdict.

Do you find, from a preponderance of the evidence, that Patricia Lopez, the driver of the vehicle which pulled in front of Susan Dawson Kilcrease's car, was negligent, and that such negligence, if any, was a proximate cause of the injuries suffered by Beulah Dawson and Susan Dawson Kilcrease, if any?

We do

(ANSWER "We do" or "We do not")

Interrogatory No. 6

Do you find, from a preponderance of the evidence, that Susan Dawson Kilcrease was negligent, and that such negligence, if any, was a proximate cause of the injuries suffered by Beulah Dawson or Susan Dawson Kilcrease, if any?

We do not

(ANSWER "We do" or "We do not")

If you have answered either Interrogatory No. 5 or Interrogatory No. 6 "we do," then answer Interrogatory No. 8. Otherwise, do not answer Interrogatory No. 8.

The percentages you find must total 100 percent. The percentage of causation attributable to a person or product is not necessarily measured by the number of acts, omissions, or product defects found.

Interrogatory No. 8

For each person or product found by you to have caused Susan Dawson Kilcrease's injuries, if any, find the percentage caused by:

The seatbelts/warnings
(General Motors Corporation) 25 %

Patricia Lopez	70	%
Susan Dawson Kilcrease	5	%
Total	100	%

***

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BEULAH DAWSON, *ET AL.*

V.

GENERAL MOTORS CORPORATION

No. 2:91cv152

ORDER

On this day came on to be considered the plaintiff's Motion for Judgment, the plaintiff's Supplemental Motion for Judgment, and the defendant's Motion for Judgment on the Verdict as to Plaintiffs Dawson and Notwithstanding the Verdict as to Plaintiff Kilcrease.

After careful consideration, the plaintiff's Motion for Judgment and Supplemental Motion for Judgment are GRANTED with interest to be calculated in accordance with the plaintiff's supplemental motion. The defendant's Motion for Judgment on the Verdict at to Plaintiffs Dawson is GRANTED. The Motion for Judgment Notwithstanding the Verdict as to Plaintiff Kilcrease is DENIED. For the reasons set out in the plaintiff's Supplemental Motion for Judgment, as well as the jury instructions, the evidence presented at trial, and the fact that the jury apparently ignored the instruction of Interrogatory No. 8 to apportion the causation among those "found by you to have caused Susan Dawson Kilcrease's injuries," the Court disregards that part of the jury's answer to Interrogatory No. 8 that apportions 5% to Susan Dawson Kilcrease.

SO ORDERED.

SIGNED this 7th day of July, 1994.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BEULAH DAWSON, *ET AL.*

V.

GENERAL MOTORS CORPORATION

No. 2:91cv152

FINAL JUDGMENT

On the 16th day of May, 1994, the above styled and numbered civil action came on for trial before the Court and a jury, William M. Steger, District Judge, presiding. After all issues were tried, the jury rendered its verdict consisting of answers to interrogatories on May 19, 1994. The jury failed to find General Motors liable to Beulah Dawson and Winfred Dawson. With regard to Susan Dawson Kilcrease's claim against General Motors, the jury found General Motors liable and assessed damages of $150,000.00.

The jury answered "We do not" to Interrogatory No. 6, which inquired if Mrs. Kilcrease was negligent, and, if so, was such negligence a proximate cause of her injuries. However, in answer to Interrogatory No. 8, the jury apparently ignored the instruction to apportion the causation among those "found by you to have caused Susan Dawson Kilcrease's injuries" by apportioning 5% of the responsibility to Mrs. Kilcrease. For the reasons set out in the plaintiff's Supplemental Motion for Judgment and in light of the jury instructions, the evidence presented at trial, and the jury's failure to follow the instruction of Interrogatory

No. 8, the Court hereby disregards that portion of the jury's answer to Interrogatory No. 8. Instead, the Court adopts the jury's more specific finding that General Motors failed to prove that Susan Dawson Kilcrease was negligent and that such negligence, if any, was a proximate cause of her injuries. Accordingly, the Court will not reduce the damage award on the basis of the jury's answer to Interrogatory No. 8. The Court will, however, reduce the award by the amount Mrs. Kilcrease received from the settling party, Patricia Lopez ($25,000.00).

General Motors received written notice of the claim of Susan Dawson Kilcrease on April 11, 1990. Accordingly, prejudgment interest began accruing at the rate of 10% per annum on October 8, 1990, 180 days later. Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1994). The Court denies the defendant's request to exclude 243 days of delay allegedly caused by the plaintiffs. The delay was not caused solely by the plaintiff and Judge Hall's continuance of this case at plaintiff's counsel's request was fair and just given the circumstances involving the plaintiff's previous lawyer. It is, therefore,

ORDERED, ADJUDGED AND DECREED that Beulah Dawson and Winfred Dawson take nothing of and from General Motors Corporation. It is, further,

ODERED, ADJUDGED AND DECREED that Susan Dawson Kilcrease have judgment over and against General Motors Corporation for damages in the amount of $163,080.09.[1] with prejudgment interest thereon at the rate of 10% per annum from October 8, 1990, to the date

[1]This amount represents the jury award of $150,000.00 plus the stipulated past medical expenses of $38,080.09 less the $25,000.00 settlement from Patricia Lopez.

preceding this judgment in the amount of $61,032.04, for a total of $224,112.13 together with post-judgment interest at the rate of 5.31% per annum until fully and finally paid. It is further,

ORDERED that all motions not previously ruled upon are hereby DENIED. It is, further,

ORDERED that all costs of court are to be borne by the party incurring the same.

SIGNED this 7th day of July, 1994.

/s/ William M. Steger
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40779

BEULAH DAWSON, ET AL.,
Plaintiffs,
SUSAN DAWSON KILCREASE,
Plaintiff-Appellee,

V.

GENERAL MOTORS CORPORATION,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas
(2:91-CV-152)

Before POLITZ, Chief Judge, JONES, and PARKER, Circuit Judges.

PER CURIAM:

Appellee Susan Dawson Kilcrease and her mother Beulah Dawson filed suit against General Motors in a products liability case involving allegations of defective safety belt shoulder harnesses. Kilcrease and Dawson were injured when, while traveling in Kilcrease's 1988 Chevrolet Cavalier convertible, they were involved in a two-car collision

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Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

south of Jasper, Texas in 1989. From a jury verdict rendered for Kilcrease, General Motors appeals, raising three issues. We reverse and remand for a new trial.

General Motors first asserts that there is insufficient evidence to support the verdict based on a theory of failure to warn the plaintiff of the need to take up slack in her shoulder belt safety harness after leaning forward in her vehicle. Having carefully reviewed the briefs and arguments of counsel and the pertinent evidence, we find no merit to this contention in a hard-fought case. General Motors also seeks a new trial on the basis that plaintiffs' expert George Greene's testimony was not timely and properly disclosed by the plaintiffs. We need not rule on that issue, however, in view of the consequence of an irreconcilable jury verdict.

General Motors' third contention, on which relief must be granted, is that judgement was improperly entered on interrogatory answers that at one point found Kilcrease was not causally negligent (Interrogatory #6), while they later (Interrogatory #8) found that she was 5% causally responsible for her injuries. General Motors is correct that in this circuit, in a Rule 49(a) special verdict case, a party need not object to the return of the jury's verdict or request resubmission of the case to the jury in order later to complain of inconsistent findings. *Mercer v. Long Manufacturing N.C., Inc.*, 671 F.2d 946, 947-48 n.1 (5th Cir. 1982). It was sufficient, albeit not the preferred practice, for General Motors to seek relief by objecting to the entry of judgment on the verdict. *Mercer, supra* at 947. Further, the trial court had no authority to ignore the jury's finding of Kilcrease's 5% causal contribution to the accident. Like the Tenth Circuit in *Bonin v. Tour West, Inc.*, 896 F.2d 1260 (10th Cir. 1990), we are simply unable to reconcile the

jury's findings here. A new trial is necessary. *Bonin*, 896 F.2d at 1263.

The judgment of the trial court is REVERSED and the case REMANDED for further proceedings consistent herewith.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40779

BEULAH DAWSON, ET AL.,
Plaintiffs,
SUSAN DAWSON KILCREASE,
Plaintiff-Appellee,

V.

GENERAL MOTORS CORPORATION,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas
(2:91-CV-152)

ON PETITION FOR REHEARING

September 8, 1995

Before POLITZ, JONES, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

No. 95-749

In The

Supreme Court of the United States

October Term, 1995

SUSAN DAWSON KILCREASE,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

QUESTION PRESENTED

The court of appeals determined that a new trial was required in this products liability case based on conflicting jury findings that the plaintiff was not causally negligent, but that she was 5% causally responsible for her injuries. Was this holding in error?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to the proceeding below were the petitioner Susan Dawson Kilcrease and the respondent General Motors Corporation.

General Motors Corporation has no parent company. Its non-wholly-owned subsidiaries are as follows:

ACG Italia S.r.l.
ACGI S.p.A.
Asset Leasing GmbH
Aura Srl
Banque Opel
Beijing WY-GM Automotive Electronic Control Co., Ltd.
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Kuno 65 KG
Carus Grundstucks-Vermietungsgesellschaft mbH & Co. Object Leo 40 KG
Centro Tecnico Herramental, S.A. de C.V.
Diavia Aire, S.A.
Diavia S.r.l.
DRB s.a./n.v.
ENCI S.A.R.L.
Federal Computer Services Corp.
General Motors de Argentina S.A.
General Motors del Ecuador S.A.
General Motors GmbH & Co. OHG
General Motors-Holde's Automotive Limited
General Motors Colmotores, S.A.
GM Ovonic L.L.C.
GM-Saab Communication GmbH
Group Lotus, plc
Hughes-JVC Technology Corporation
IBC Vehicles Ltd.
IBC Vehicles (Distribution) Limited

LIST OF PARTIES AND RULE 29.6 LIST – Continued

Isuzu Motors Ltd.
Japan Systems Company Ltd.
Kabelwerke Reinshagen GmbH
Kabelwerke Reinshagen Werk Berlin GmbH
Kabelwerke Reinshagen Werk Neumarkt GmbH
Millbrook Pension Management Ltd.
New United Motor Manufacturing, Inc.
Opel-Automobilwerk Eisenach-PKW GmbH
OPEL Leasinggesellschaft mbH
Packard CTA Pty. Ltd.
Packard Electric Vas kft
PT General Motors Buana Indonesia
Saab Automobile AB
Subarban Limited Liability Company
Texton P.L.C.

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9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2510 (2d ed. 1995) 6

RESPONDENT'S BRIEF IN OPPOSITION

The respondent General Motors Corporation respectfully requests that this Court deny the petition for writ of certiorari in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is tabulated at 66 F.3d 323 but is not reported. It is reprinted in the appendix to the petition at pages A-9 through A-11.

The rulings of the United States District Court for the Eastern District of Texas are not reported. They are reprinted in the appendix to the petition at pages A-4 through A-8.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1995. The petitioner's timely petition for rehearing was denied on September 8, 1995.

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is an appeal from a judgment on a jury verdict in favor of petitioner Susan Dawson Kilcrease ("Kilcrease")

against respondent General Motors Corporation ("General Motors") in a products liability case involving allegations of defective safety belt shoulder harnesses. The case arises out of a 1989 automobile accident in which Kilcrease's Chevrolet vehicle collided with a van which unexpectedly made a U-turn in front of her. (3 R. 299; 4 R. 652; 5 R. 14, 23, 51-52). Kilcrease (the driver) and her mother Beulah Dawson ("Dawson") (the front-seat passenger) were seriously injured in the collision.

Kilcrease and Dawson brought suit against General Motors on various crashworthiness theories, alleging design and warning defects in the vehicle's safety belt system. (3 R. 300; 4 R. 653-54; 6 R. 57-59, 62-69). It was the plaintiffs' theory that they were wearing their lap and shoulder safety belts, but that the shoulder harnesses failed to restrain them in the collision. It was General Motors' theory that the plaintiffs were not wearing their safety belts.

At trial, the jury exonerated General Motors as to the product defect claims and as to Dawson's claims, but found for Kilcrease on her failure to warn theory. (2 R. 230-31). In separate Rule 49(a) special findings, the jury found that Kilcrease was not causally negligent, (2 R. 232), but apportioned the causal responsibility for Kilcrease's injuries 25% to General Motors, 70% to the van driver, and 5% to Kilcrease herself, (2 R. 233). The trial court rendered judgment on the verdict, (2 R. 172-74), and denied General Motors' motion for new trial, (1 R. 10).

On General Motors' appeal, the court of appeals reversed and remanded for new trial, holding that the

jury's findings were irreconcilably inconsistent and that the trial court was without authority to choose between them in formulating its judgment. The court of appeals also rejected General Motors' challenge to the sufficiency of the evidence of causation, and found it unnecessary to address General Motors' contention that the surprise testimony of an expert witness should have been excluded.

REASONS FOR DENYING THE WRIT

The petitioner points to no conflict among the circuits which would justify the granting of a writ of certiorari in this case. Nor does she identify an issue of national importance which warrants this Court's attention. To the contrary, the legal principles applicable to this case are well-settled and undisputed; the petitioner challenges only the Court of Appeals' application of those principles to the facts of this particular case.

The Fifth Circuit is well aware of its Seventh Amendment-based duty to engage in a "concerted effort" to reconcile a jury's apparently conflicting findings in a special verdict case under Fed. R. Civ. P. 49(a). *See, e.g., Munn v. Algee*, 924 F.2d 568, 576 (5th Cir. 1991); *Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1040-41 (5th Cir. 1982); *Guidry v. Kem Manufacturing Co.*, 598 F.2d 402, 406 (5th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

The Fifth Circuit is also mindful, however, of its Seventh Amendment-based inability, and a corresponding inability on the part of the district courts, to choose between irreconcilably inconsistent jury findings in formulating a judgment. *See, e.g., FDIC v. Munn*, 804 F.2d

860, 866 (5th Cir. 1986); *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 781 n.9 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987); *Brunner v. Maritime Overseas Corp.*, 779 F.2d 296, 297 (5th Cir.), *cert. denied*, 476 U.S. 1115 (1986); *Guidry v. Kem Manufacturing Co.*, 598 F.2d at 406.

The petitioner does not claim that the Fifth Circuit is ignorant of these principles, or that it has rejected them, or that it has found them inapplicable, or that it has engrafted onto them an improper exception or unwarranted gloss. Instead she claims only that the principles were not properly applied in the context of her specific case. This Court does not sit to review such microcosmic claims of error. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925).

Moreover, no error is presented. The court below correctly recognized the irreconcilable inconsistency between the jury's finding in this case that Kilcrease was not causally negligent and its finding that she was 5% comparatively responsible for her own injuries. The court appropriately found support in *Bonin v. Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990), where a new trial was held to be required after the jury found the defendant not causally negligent but apportioned to the defendant 5% of the responsibility for one plaintiff's injuries and 10% of the responsibility for the other plaintiff's injuries.

The petitioner argues that the comparative responsibility question in this case did not require *negligent* causation, and that the answer to that question is therefore not inconsistent with the finding of non-negligence. Pet. at 6, 8. The court below properly declined to engage in such hair-splitting. *See Bahamas Agricultural Industries*

Ltd. v. Riley Stoker Corp., 526 F.2d 1174, 1182 (6th Cir. 1975), where the Sixth Circuit rejected a similar proffered distinction between a finding of no "causal negligence" on the part of the defendant and an apportionment of "negligence" to the defendant.

"[I]t is the duty of the courts to attempt to harmonize the answers, *if it is possible under a fair reading of them.*" *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108, 119 (1963) (emphasis supplied). Here, under a "fair reading," the apportionment question must be taken as inquiring about negligent causation, just as the apportionment question in the *Bahamas Agricultural* case was taken as inquiring about causal negligence notwithstanding its nominal limitation to negligence.

The merits of this approach become more apparent when the focus is shifted from abstract semantics to the actual evidence in this case. There was no basis in the evidence for the jury to have found what the petitioner now posits that the jury found, namely that Kilcrease partially "caused" her own injuries in a non-negligent way. The evidence showed that another driver abruptly turned in front of Kilcrease's car; unless the jury believed that Kilcrease had failed to wear her safety belt (a belief negated by the finding of a causal warning defect), or that she was negligently travelling at an excessive rate of speed[1] or had otherwise negligently failed to avoid the

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[1] There was conflicting evidence regarding the speed of Kilcrease's vehicle at the time she began to brake. *Compare* 5 R. 25 (50-55 m.p.h.) *and* 6 R. 49-51 (52-58 m.p.h.) *with* 7 R. 13-14 (at least 65 m.p.h.) *and* 8 R. 26-27 (skid began at 60-64 m.p.h.).

collision, there was no basis for a finding that Kilcrease had caused her own injuries.

The petitioner's passing comment, in the nature of an afterthought, that "this Court should harmonize the procedures called for in preserving claimed error in jury verdicts under Subdivisions (a) and (b) of Rule 49, F.R.C.P.," Pet. at 9, presents no certworthy issue. This case was not argued or decided below on the basis of a conflict of decisions concerning preservation of error,[2] and preservation of error is not mentioned in the Questions Presented section of the petition.

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[2] Most, but not quite all, courts follow the error preservation rule articulated by the Fifth Circuit in this case, that no predischarge objection to the internal inconsistency of a Rule 49(a) special verdict is required as a predicate to complaint on appeal. *See* 5A J. Moore, *Moore's Federal Practice* ¶ 49.03[4], at 49-46 & n.17 (2d ed. 1995), and 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2510, at 215-26 & n.19 (2d ed. 1995), both collecting cases.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be denied in this case.

Respectfully submitted,

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